No. 2425.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

FARMERS AND MERCHANTS' BANK, PHOENIX, as Intervener,
Appellant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION and ARIZONA TRUST COMPANY and SIMS ELY, as Receiver for the ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION and ARIZONA TRUST COMPANY, and the Intervening Petitioners Who Were Allowed to Intervene in the Cause Entitled CHARLES W. CLARK, Complainant, vs. ARIZONA MUTUAL SAVINGS AND LOAN ASSOCIATION and ARIZONA TRUST COMPANY, Defendants, in the Court Below, by the Decree of March 12, 1914.
Appellees.

Brief of Appellant

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On appeal from the United States District Court for the District of Arizona.

This is an appeal by the Farmers' and Merchants' Bank of Phoenix from a decree and from an order of

the United States District Court for the District of Arizona, dated March 12, 1914.

On July 29, 1913, the appellant filed in the court below (R. p 75) its petition in the nature of a general creditors' bill against the Arizona Trust Company. The bill (R. p 39-75) invoked the ancillary jurisdiction of the court below and was intended as a suit auxiliary to the cause of Clark vs. The Arizona Mutual Savings & Loan Association and Arizona Trust Company, which on February 27, 1913, had resulted in a final decree, the terms of which were in process of execution by the receiver of the court below.

The bill was entitled, in the cause of Clark vs. The Arizona Mutual Savings & Loan Association and Arizona Trust Company (R. p. 39) and alleged in substance the existence of Federal jurisdiction of that cause as a controversy between citizens of different states involving the requisite amount.

It asserted the jurisdiction of the court below over the matters presented by the bill depended upon the pendency of the cause in which it was filed and of the exclusive jurisdiction then being exercised by that court over the *res* and subject matter involved in the proceedings.

It fully described the cause in which it filed its bill and in substance alleged it to be a stockholders' suit against the two companies named, instituted for the ben-

efit of the complainant and all others similarly situated, wherein a receiver of the Loan Association, the marshalling of its assets and its distribution to those lawfully entitled thereto, was sought.

It declared that the original suit had been brought to set aside a transfer of the assets of the Loan Association, which had been made to the Trust Company of all the former's property.

It alleged the exclusive character of the jurisdiction exercised by the court below over both companies and all the properties of such companies which were in the hands and control of the court's receiver.

It averred that the approximate value of the assets of the insolvent defendants was in the neighborhood of $70,000.00; that the liens established and fixed by the terms of the final decree of February 27, 1913, in the cause amounted to about the sum of $50,000.00, and expressly declared that after the payment of the liens directed by the final decree of February 27, 1913, to be paid, a surplus would remain which would be due and payable to the defendant Trust Company.

It then alleged (R. p 44) that on July 12, 1913, the appellant obtained a judgment in the Superior Court of the State of Arizona in and for the County of Maricopa, against the Trust Company for the sum of $18,500.00.

It alleged that when this judgment was entered in the state court, the permanent receiver of the court be-

low was then in full and exclusive possession of all of the assets of the Trust Company and that it could not without contempt to the learned court below and precipitating a conflict of jurisdiction between the two courts issue execution upon its judgment or do any other act for the purpose of satisfying its judgment out of the properties of the Trust Company, and that for the reasons set forth no execution had in fact issued.

It alleged that it was without remedy to collect its judgment except with the consent and approval of the court below.

It directed attention to the limited nature of the receivership established by the decree of February 27, 1913, as to the Trust Company and alleged that that receivership should in justice to it as a judgment creditor of the Trust Company be extended to it for its benefit and the benefit of all other judgment creditors of the Trust Company similarly situated, and for the benefit of all those having or claiming to have rights and claims against the Trust Company to the end that these rights and the priorities of each claimant might be ascertained and determined (R. p 46).

The petition then averred (R. p 46) that in addition to the assets then in the hands of the receiver, assets and property belonging to the Trust Company to the extent of many thousands of dollars should be recovered by it from the former officers and directors, among

others, particularly from A. J. Edwards, W. T. Smith and John T. Dunlap, to the end that the insolvent estate might thereby be increased for its benefit and for the benefit of others similarly situated.

The petition then sets forth (R. p. 47) the cause of action against the delinquent officers.

It alleges the accountability of A. J. Edwards to the company in a sum approximating $32,022.00. This liability was predicated upon breaches of trust including what in reality was nothing but a common larceny of about $14,522.68, the making of unlawful preferential payments to certain stockholders while the companies were wholly insolvent and unable to discharge their other obligations in full, the pledging of a large quantity of securities which he knew belonged to the Loan Association to secure a loan to the Trust Company of $6,000.00

The directors, Smith and Dunlap, were charged with liability amounting to many thousands of dollars. The basis of liability as to these officers was breaches of trust involving the conduct of corporate affairs for their own instead of their company's benefit, gross mismanagement and negligence, resulting in heavy loss to the company, which ultimately redounded to their own benefit, and the illegal disposal of the assets of the insolvent estate, consisting in the making of so-called "Ledger Settlements" with the stockholders of the insolvent

estate, the effect of which was to give such persons inequitable preference over and above others similarly situated, which reduced the corpus of the insolvent estate and for which the petitioner sought to have the estate reimbursed. The loss resulting from these unlawful ledger settlements aggregated about $4,435.67. A further loss of $3,766.00 was said to result from a conveyance of certain property of the company wholly without consideration moving to the company (R. p 60).

It was charged (R. p 61) that these officers occasioned a loss not exceeding $36,000.00 to the company by failing to protect one piece of the company's property against foreclosure; another similar loss of not more than $36,000.00 nor less than $9,000.00 was alleged (R. p 62-64) and a third transaction similar in nature in which the loss was estimated at $32,000.00, was set forth.

In addition to these matters, it was alleged (R. p 67) that a large number of the stockholders of the defendant Trust Company are indebted to the Trust Company for the unpaid purchase price and subscription to stock in that company and to the end that the funds in the hands of the court, with which to pay and discharge the debts of the Trust Company to its lawful creditors, might be increased in value the said stockholders of the Trust Company should be required to pay in full their respective subscriptions to the receiver of the Trust Company.

The prayer was (R. p 68) that the limited receivership of the Trust Company be extended to the petitioner's judgment, not only for its benefit, but for the benefit of all other claimants, that a master might be appointed to take proof of and report upon the priorities of claimants against the Trust Company, its assets marshalled and distributed to those found to be lawfully entitled to them; that the petitioner be awarded a preference over the other creditors because of its diligence and the increased enhancement of the estate through its efforts and that process issue directed to the individuals named requiring them and each of them to appear and answer the allegations of the bill.

An accounting from and discovery by the delinquent directors was prayed.

The petitioner expressly asserted the right to file the petition without leave of court and the petition was so filed, but to avoid doubt and confusion concerning the right of the petitioner so to intervene permission to intervene was prayed for and a prayer for general relief was included.

The record shows (R. p 76) that the petitioner's motion to extend the receivership was first noticed for hearing before Circuit Judge Morrow at San Francisco, August 4, 1913.

We do not find the order disposing of the motion in the record, but the application was denied without prej-

udice to the renewal before the District Judge for the District of Arizona, then immediately about to be appointed. The motion was renewed later (R. p 78) and was noticed for argument before the learned court below on September 15, 1913. The matter was heard on September 18, 1913, (R. p 81) and taken under advisement by the court. The motion remained in the breast of the court for many months and it was not until March 12, 1914, that the court below entered the decree of that date (R. p. 92-98) and on the same day denied the application of the appellant (R. p 98-99) to intervene and dismissed its bill.

This order denying the appellant's application to extend the receivership to its judgment was most sweeping in its character. It not only denied the application to extend the receivership, but it expressly denied the appellant's prayer for process against the delinquent directors and it dismissed the appellant's petition (R. p 99) and this was done, although the order expressly recited that no one had interposed any opposition to the appellant's motion (R. p 99).

With all convenient speed thereafter the appellant presented to the learned court below its petition and other appropriate papers for the prosecution of an appeal from the decree and from the order of March 12, 1914, but the application was denied (R. p 100-101).

Thereupon, pursuant to the authority conferred by

Section 132 of the Judicial Code upon the judges of the Circuit Courts of Appeal to allow writs of error and appeals, application for the allowance of the appeal upon the same papers was made to Circuit Judge Morrow and the appeal was duly allowed (R. p 110).

It is to review the alleged decree of March 12, 1914, (R. p 92-98) and the order dismissing appellant's bill or petition (R. p 98-99) that this appeal is prosecuted.

Appellant assigns as error in the decree (R. p 112) that it is a nullity because it assumed after the expiration of the term at which the final decree of February 27, 1913, was entered to nullify and destroy that decree; that the annulment of that decree constituted a lasting prejudice to the appellant because the appellant had by virtue of its judgment and its proceedings below acquired a vested property right in the surplus remaining after the execution of the decree of February 27, 1913, and moreover in effect gave to the ordinary preferred stockholder of the insolvent Trust Company, at whose instance the original decree was nullified, rights in the assets of that insolvent company prior and superior to those of the appellant in its capacity of a lawful judgment creditor of that company.

The errors assigned in the making of the order appealed from present for review the appellant's contention that it has a right to intervene in the cause as to the surplus and to participate in the distribution thereof

and that that right is absolute and not dependent upon the exercise of discretion by the court below (Assignment IV and VIII, page 114-115); also its right to have process issue against the delinquent directors specified (Assignment V, page 114); also its right to have the receivership extended to its judgment (R. p 114-115, Assignment VI). The assignments will be discussed in the order specified above.

POINT I.

THE DECREE OF MARCH 12, 1914, IS APPEALABLE AND SHOULD BE REVERSED.

The right to review the decree of March 12, 1914. is claimed upon two grounds:

1. Because the decree is a nullity.

2. Because as to this appellant it is a final adjudication destructive of its rights.

The right to review a decree which is a nullity appears to be recognized by Phillips vs. Negley, 117 U. S. 665.

In that case the court said, at p 671-672:

"If, on the other hand, the order was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court."

That the decree of March 12, 1914, is a nullity, we regard as hardly the subject of dispute.

It is indisputable that the decree of February 27, 1913, was duly entered on that day.

The term at which that decree was entered expired by operation of law on April 5, 1913.

The motion to vacate it was filed July 15, 1913, (R. p 38) and on March 12, 1914, the alleged decree which in effect nullified the decree of February 27, 1913, was filed.

Nothing is better settled than the proposition that a Federal Court is without jurisdiction to vacate, annul or modify a final decree after the expiration of the term at which it is granted.

Bronson vs. Schulten, 104 U. S. 410, 415.

Sibbald vs. United States, 12 Pet. 487, 491.

Nor is there any doubt of the final character of the decree of February 27, 1913.

As stated by Professor Simkins in the Second Edition of A Federal Equity Suit, on page 607: "A final decree is one that entirely disposes of the cause so that nothing is left for the court to adjudicate (2 Dan. Ch. Pr. 974 N); or a decree that disposes ultimately of the

suit (Adams Equity, page 375); or a final decree is one determining the litigation on its merits, and leaves nothing to be done, but to enforce by order of execution, what was determined by the court," citing in support thereof the following cases:

Talley v. Curtain, 7 C. C. A. 1, 8 U. S. App. 424, 58 Fed. 4.

Blythe v. Hinckley, 84 Fed. 238.

Maas v. Lonstorf, 91 C. C. A. 627, 166 Fed. 41.

New Orleans v. Peake, 2 C. C. A. 626, 2 U. S. App. 403, 52 Fed. 76.

Harrison v. Clarke, 90 C. C. A. 413, 164 Fed. 539.

Beebe v. Russell, 19 How. 283-286, 15 L. ed. 668, 669.

Odbert v. Marquet, 99 C. C. A. 60, 175 Fed. 50, 51.

Wilson v. Smith, 61 C. C. A. 446, 126 Fed. 919;

Scriven v. North, 67 C. C. A. 348, 134 Fed. 366.

Sanders v. Bluefield Waterworks & Improv. Co., 45 C. C. A. 475, 106 Fed. 587.

Easton v. Houston & T. C. R. Co., 44 Fed. 9.

St. Louis, I. M. & S. R. Co. v. Southern Exp Co., 108 U. S. 24, 27 L. ed. 638, 2 Sup. Ct. Rep. 6.

Andrews v. National Foundry & Pipe Works, 19 C. C. A. 548, 34 U. S. App. 632, 73 Fed. 517.

Gunn v. Black, 8 C. C. A. 542, 19 U. S. App. 489, 60 Fed. 159.

Re Michigan C. R. Co., 59 C. C. A. 643, 124 Fed. 730, 731.

We deem it unnecessary to discuss at length the

contention of the court below that the decree of February 27, 1913, is void for want of jurisdiction.

No jurisdictional defect is apparent on the face of the decree and the argumentative portion of the alleged decree of March 12, 1914, shows that the only claim of invalidity in the decree of February 27, 1913, consists in the assertion that the decree was not supported by the pleadings and that the court exceeded its powers in awarding a lien to the interveners, thereby compelling the parties who were interested in the assets of the Loan Association to bear all the loss incurred in the conduct of that business.

The pleadings in the original suit are not included in this record and indeed have no place here, but the lengthy and minute description of the character of the action contained in appellant's bill (R. p 39 et seq) sufficiently discloses the nature of the pleadings and shows that the decree was well supported thereby. Moreover, we respectfully submit that it is entirely immaterial whether the decree of February 27, 1913, was supported by the pleadings or not. The decree of February 27, 1913, was not made the subject of attack or review befor any appellate tribunal. It was certainly good against a collateral attack so long as it stood unreversed. It was never even appealed from, much less reversed. A mere motion to vacate it was made after the expiration of the term at which it was granted, but before the time to review it by appropriate appellate procedure had expired.

Indeed, the motion to vacate was granted not upon any of the grounds specified in the motion, but because it was supposed by the learned court that the decree was not supported by the pleadings and for that reason subject to annulment by it. But as we have indicated, such contention, even if true, presented no grounds for its annulment after the term at which it was granted by a different judge holding the same court which originally gave it life. Such a question, if it existed, was exclusively for an appellate tribunal to pass upon and not for the court below to entertain or determine.

If true, it constituted mere reversible error, not a want of jurisdiction.

This court and not the court below is the court for the correction of errors in such courts. It was obviously not a void decree, however erroneous it may have been.

So, upon the other branch of the court's contention that the court exceeded its authority in awarding the liens described in the decree, the contention is equally without merit. The court, as constituted in February, 1913, was not of the same opinion. It had jurisdiction to determine the matters before it, including the extent and proper exercise of its own authority. It was not for the same court, when presided over by another judge, to readjudicate the same question and to sit in judgment on his predecessor as a court of review and to assume to revise for ordinary alleged error the judicial acts of

his learned predecessor. With great respect, we submit that the court's own statement of the grounds of annulment constitutes its own perfect refutation.

But we say that the decree is appealable by appellant because it is final as to it. The alleged decree of March 12, 1914, obliterated the surplus in which the appellant had acquired a vested interest. That surplus was not again to be created. It was to be and has in part been consumed in the exploits initiated by the decree of March 12, 1914. It finally adjudicated as to appellant that it had no rights in that surplus since obviously if the court had held that appellant had any rights therein it would not have wiped out the surplus to its detriment and rendered its rights therein absolutely uninforceable except by this appeal. The question whether a decree is final and appealable is not determined by the name which the court below gives it, but must be tested by a consideration of the essence of what is done by the decree.

Potter v. Beal, et al, 50 Fed. 860.

See also Standley v. Roberts, 50 Fed. 836.

Sanders v. Bluefield Waterworks & Imp. Co., 160 Fed. 587.

Hill v. Chicago & Evanston Railroad Co., 140 U. S. 52.

The effect of the decree of March 12 was greatly to enlarge the class of persons alleged to be entitled to participate in the assets, which by means of the decree of

February 27, 1913, had been conserved and were in process of liquidation to meet a specific charge of about $50,000.00, leaving a balance of about $20,000.00 to be turned over to appellant's judgment debtor.

But the alleged decree of March 12 swept away the specific lien of $50,000.00, permitted the reception of approximately one hundred more stockholders in the insolvent Trust Company, who claimed thousands of dollars of its assets, into the litigation to the end that THEY might participate in the assets of the Loan Association, a company in which they were no longer even stockholders, even though such participation meant that stockholders in the insolvent institution, the Trust Company, were to be assured and guaranteed a preference and priority in the distribution of such assets over and above the lawful judgment creditor of the insolvent institution.

However, intermediate and interlocutory the instrument of March 12 may have been in its application to those effected thereby other than appellant, does not deprive that decree of its absolute and complete finality as to appellant.

We respectfully submit that as to the appellant the decree of March 12, 1914, was final and for that reason appealable.

We respectfully submit that the foregoing discussion not only demonstrates the appealability of that de-

cree as to appellant, but it also shows the utter and absolute lack of foundation to support it. It shows that without legal authority, nay more, there being a total absence of power so to do, the court below destroyed a vested property right of the appellant which, but for its unauthorized act and the consequent impairment of the assets of the estate, was worth $18,500.00. To revise that error, this appeal is prosecuted.

That the appellant is prejudiced by the errors specified needs no further demonstration.

Those errors, we respectfully submit, must result in the reversal of the decree of March 12, 1914.

POINT II.

THE ORDER OF MARCH 12, 1914, IS APPEALABLE AND SHOULD BE REVERSED.

The order is appealable.

Credits Commutation Company v. United States, 177 U. S. 311.

Ramsey v. Illinois Steel Company, 100 C. C. A. 323, 176 Fed. 863.

Price v. Union Land Company, 187 Fed. 886.

We respectfully submit that the elimination of the decree of March 12, 1914, necessarily and of itself must result in the reversal of the order of the same date.

This order, as we have seen, denied to the appellant

access to the court, which had exclusive jurisdiction of the controversy presented by appellant's bill. Its denial was a denial of the right to intervene, a right which is absolute in such cases and not the subject of discretionary denial by the court.

It has uniformly been the practice in the Federal Courts to file creditors' bills and bills of the nature thereof as a matter of right without leave of court.

Credits Commutation Co. v. United States. 91 Fed. 573, 177 U. S. 315-316.

Myers v. Fenn, 5 Wall 207.

Richmond v. Trous, 121 U. S. 43, 47.

Nat. Bank vs. Allen, 90 Fed. 545, 555.

Hubb v. Bidwell, 151 Fed. 564.

It denied to the appellant the writ of subpoena, for which it prayed, and by so doing the appellant was denied process, by which it sought to bring before the court men charged with breaches of trust and the misappropriation of funds committed to them as fiduciaries in order that they might be compelled to account for their misconduct.

Instead of process issuing as a matter of course, the learned court by its order expressly denied the right thereto and in effect accorded these particular individual defendants the extraordinary privilege of immunity from suit in that court. They were not even to be re-

quired to respond to the court's process or the appellant's complaint.

Before service of process upon them and without the necessity of contention upon their part, it was determined by the learned court that no cause of complaint existed in appellant against them and now after a complete paralysis of judicial process for a period of more than a year the right of these defendants to be exempt from the service of process in the court below continues to and will exist until reversal here.

We think the admitted insolvency of the Trust Company, its admitted debt, evidenced by a judgment of a competent court of record in favor of the appellant, the exclusive character of the jurisdiction which the court below was exercising over the subject matter in which the appellant was interested, shows without further argument its indisputable right to the extension of the receivership of the Trust Company for appellant's benefit and the benefit of those similarly situated.

POINT III.

THE REVERSAL OF THE ORDER OF MARCH 12, 1914, ALONE AFFORDS NO ADEQUATE RELIEF TO APPELLANT.

Should it be determined that appellant was not entitled to appeal from the alleged decree of March 12,

1914, and that it is entitled to appeal from the order of that date and that the order should be reversed, then we respectfully submit that this court in aid of its appellate jurisdiction and in order to render the reversal of the order of March 12, 1914, effective should issue a writ of mandamus to the court and the learned judge below to expunge from the record the decree of March 12, 1914, reinstate the decree of February 27, 1913, and carry out the terms thereof. To reverse the order of March 12, 1914, without reinstating and enforcing the decree of February 27, 1913, would afford no remedy whatever to the appellant and would not restore to it its vested property right in the surplus remaining after the payment of the liens established by the decree of February 27, 1913.

We respectfully submit that the decree of March 12, 1914, and the order of the same date should be reversed with costs.

Respectfully submitted,

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